

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BEVERLY A. BERRY and U.S. POSTAL SERVICE,
POST OFFICE, Houston, TX

*Docket No. 99-1691; Submitted on the Record;
Issued August 11, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant established that her diagnosed psychiatric condition was causally related to her June 21, 1996 employment injury; and (2) whether the Office of Workers' Compensation Programs properly reduced appellant's wage-loss compensation, effective April 26, 1998, based on its determination that the selected position of receptionist represented her wage-earning capacity.

On June 21, 1996 appellant, then a 39-year-old distributions operations supervisor, sustained back and neck injuries while in the performance of duty. She ceased working the day following her injury. The Office accepted appellant's claim for cervical and lumbar strain as well as herniated discs at C3-7.¹ On July 27, 1996 appellant returned to work in a part-time, limited-duty capacity. She worked four hours per day and the Office compensated her for an additional four hours. Appellant ceased working on December 10, 1996 and claimed that she was unable to perform her duties as a result of depression and anxiety attacks. Appellant attributed her depression and anxiety to chronic pain stemming from her accepted employment injury of June 21, 1996. She also attributed this condition to her dependence on pain medication.

On August 14, 1997 the Office denied appellant's claim for compensation based on appellant's failure to establish that her emotional condition was related to the previously accepted employment injury of June 21, 1996.

The Office subsequently referred appellant for further medical evaluation to ascertain the extent of her employment-related disability. The medical evidence obtained indicated that, from an orthopedic standpoint, appellant was capable of working an eight-hour day under certain

¹ In addition to her accepted condition, the Office noted that appellant had preexisting conditions of asthma and bipolar disorder. Additionally, appellant was involved in a nonwork-related motor vehicle accident in February 1997.

physical limitations.² The Office then referred the case to a rehabilitation specialist to assist in identifying and determining the availability of suitable employment.

By decision dated April 23, 1998, the Office found that the position of receptionist represented appellant's wage-earning capacity as of April 26, 1998. Consequently, the Office reduced appellant's wage-loss compensation in a separate decision dated April 29, 1998.

Appellant subsequently requested an oral hearing, which was held on October 21, 1998. And in a decision dated January 13, 1999, the Office hearing representative affirmed the August 17, 1997, April 23 and 29, 1998 decisions.

With respect to the issue of whether appellant established that her diagnosed psychiatric condition was causally related to her June 21, 1996 employment injury, the Board finds that the decision of the hearing representative of the Office dated January 13, 1999 is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the hearing representative.

The Board further finds that the Office erred in determining that the selected position of receptionist represented appellant's wage-earning capacity and, therefore, the Office improperly reduced appellant's wage-loss compensation.

Once the Office accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁴ Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.⁵

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles*, or

² Additionally, the medical evidence of record indicated that appellant was currently disabled from resuming any type of gainful employment as a result of her psychiatric condition.

³ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

⁴ *See Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁵ 5 U.S.C. § 8115(a); *see Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

otherwise available in the open labor market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁶

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects appellant's vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.⁷ Additionally, the Office's procedure manual provides as follows:

"The [claims examiner] is responsible for determining whether the medical evidence establishes that the claimant is able to perform the job, taking into consideration medical conditions due to the accepted work-related injury or disease and any preexisting medical conditions. (Medical conditions arising subsequent to the work-related injury or disease will not be considered.) If the medical evidence is not clear and unequivocal, the [claims examiner] will seek medical advice from the [district medical adviser], treating physician, or second opinion specialist as appropriate."⁸

In the instant case, while the Office acknowledged that appellant had a preexisting condition of bipolar disorder, the Office knowingly excluded this information from consideration when selecting a position that ostensibly reflected appellant's vocational wage-earning capacity. The record indicates that the Office specifically instructed the rehabilitation specialist to identify appropriate positions that were based solely on appellant's orthopedic limitations. This directive was clearly contrary to the Office's procedure manual.⁹ Accordingly, the Board finds that the Office erred in diverting from its stated procedure.

⁶ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁷ *Samuel J. Russo*, 28 ECAB 43 (1976).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

⁹ The apparent explanation for this departure from Office procedure was that, although appellant had previously been hospitalized in 1994 for her emotional condition, the medical records did not indicate that she suffered any disability as a result of this condition at the time of her June 21, 1996 work injury. This explanation clearly demonstrates a fundamental lack of understanding of the recurrent and episodic nature of appellant's diagnosed psychiatric condition. Furthermore, while appellant's bipolar disorder may not have regularly effected her ability to perform the duties of a distributions operations supervisor, this does not necessarily indicate that she could similarly function as a receptionist.

The Office also failed to meet its burden of proof in reducing appellant's compensation because the record does not clearly indicate that, even from an orthopedic standpoint, appellant is capable of performing the duties of a receptionist. The selected position of receptionist is purportedly consistent with the "orthopedic" limitations noted by Dr. Frank L. Barnes, a Board-certified orthopedic surgeon and Office referral physician. In his September 24, 1997 report, Dr. Barnes indicated that, based upon the results of his physical examination, appellant "could *probably* do her assigned job as a supervisor...." He also completed a Form OWCP-5 (work capacity evaluation) wherein he noted that appellant was capable of working eight hours per day with limitations of "reaching overhead or looking upwards." Dr. Barnes further indicated that these activities should be restricted to one hour per day, two to three minutes at a time. He also noted that appellant's emotional condition may limit her ability to handle stress and maintain concentration.

The record indicates that the position of receptionist requires frequent reaching, which is defined as occurring "from 1/3 to 2/3 of the time." Based on this job description, during the course of an 8-hour workday appellant would be required to reach a minimum of 2.6 hours and as many as 5 hours per day. As previously noted, Dr. Barnes restricted appellant to one hour of reaching overhead per day. Inasmuch as the position requires an excessive amount of reaching and does not clearly indicate the type of reaching involved, the Office has failed to demonstrate that the selected position of receptionist is consistent with the limitations imposed by Dr. Barnes. The Board, therefore, concludes that the Office erred in determining that the selected position of receptionist represented appellant's wage-earning capacity.

The January 13, 1999 decision of the Office of Workers' Compensation Programs is affirmed with respect to the determination that appellant failed to establish that her diagnosed psychiatric condition was causally related to her June 21, 1996 employment injury. However, the Office's January 13, 1999 determination that the selected position of receptionist represented appellant's wage-earning capacity is, hereby, reversed.

Dated, Washington, D.C.
August 11, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member